Supreme Court, U.S.
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No. 04-116

IN THE

Supreme Court of the United States

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

v.

INEZ PREECE CAMPBELL and MATTHEW C. BARNECK, Special Administrator and Personal Representative of the ESTATE OF CURTIS B. CAMPBELL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UTAH SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Utah Supreme Court's decision on remand directly contravened this Court's mandate in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), and fundamental due process principles, by imposing a punitive damages award vastly in excess of the amount this Court deemed constitutionally permissible, by contradicting and rejecting specific holdings and findings of this Court in its application of the constitutional punitive damages guideposts, and by relying on the defendant's perceived lack of remorse in its defense and appeal of this case as a basis for punitive damages?

PARTIES TO THE PROCEEDING AND DESIGNATION OF CORPORATE RELATIONSHIP

Petitioner State Farm Mutual Automobile Insurance Company is a mutual insurance company. It has no parent company.

Respondent Inez Preece Campbell is an individual. Respondent Matthew C. Barneck is the special administrator and personal representative of the Estate of Curtis B. Campbell.

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Petitioner State Farm Mutual Automobile Insurance Company ("State Farm") respectfully petitions for a writ of certiorari to review the judgment of the Utah Supreme Court entered on remand from this Court's decision in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003).

OPINION BELOW

The opinion of the Utah Supreme Court (A.1), which is available at 2004 WL 869188, is not yet officially reported.

STATEMENT OF JURISDICTION

The judgment of the Utah Supreme Court was entered on April 23, 2004. No petition for rehearing was filed. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides: "No state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

In *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), this Court vacated a $145 million punitive damages award and remanded the case to the Utah Supreme Court for proceedings not inconsistent with this Court's opinion. Despite this Court's admonition that the outermost due process limit for a punitive damages award under the facts of this case specifically would be "at or near the amount of compensatory damages" of $1 million, *id.* at 429, the Utah Supreme Court has now imposed a $9 million punitive damages award. The Utah Supreme Court's decision is contrary to the due process principles limiting punitive damages awards articulated by this Court in this very case and to this Court's application of those principles to State Farm's alleged conduct toward the Campbells.

Mr. Campbell's Case. This case began with State Farm's handling of claims asserted by third parties against a State Farm insured, Curtis Campbell, after a 1981 automobile accident. State Farm declined an offer to settle the claims

against Mr. Campbell for the policy limits ($50,000) and proceeded to trial. Mr. Campbell was found 100% at fault, and judgment was entered against him in the amount of $136,000 over his policy limits. The excess judgment against Mr. Campbell was the only instance in Utah where a State Farm insured was exposed to the possibility of execution on an excess judgment after a refusal by State Farm to settle within policy limits.

After the excess judgment against Mr. Campbell was affirmed on appeal, Mr. Campbell and his wife, represented by the attorneys for the third-party plaintiffs who had sued him, sued State Farm alleging bad faith failure to settle, intentional infliction of emotional distress, and fraud, and asserting a claim for punitive damages. The jury found against State Farm and awarded $1.4 million and $1.2 million emotional distress damages to Mr. and Mrs. Campbell, respectively, $911.25 for the Campbells' out-of-pocket legal expenses, and $145 million in punitive damages. The trial court remitted the emotional distress damages to $1 million in total and remitted the $145 million punitive award to $25 million. On appeal, the Utah Supreme Court reinstated the $145 million punitive award.

This Court's Decision. This Court granted certiorari and reversed the $145 million punitive award as excessive as a matter of due process under the three guideposts established by this Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), for evaluating the constitutionality of punitive damages awards. In its opinion, this Court held that punitive damages may not be imposed to punish conduct that was dissimilar to and bore no relation to the conduct directed against the plaintiffs, but must be "based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *Campbell*, 538 U.S. at 425. The Court also gave guidance as to how the three *Gore* guideposts should be applied and analyzed those guideposts with specific reference to the facts and circumstances in this case.

With regard to reprehensibility, this Court observed that State Farm's conduct toward the Campbells "merits no praise." *Id.* at 419. Nonetheless, this Court characterized the harm in the case as "ar[ising] from a transaction in the economic realm, not from some physical assault or trauma," and

noted that "there were no physical injuries." *Id.* at 426. This Court also recognized that "State Farm paid the excess verdict before the complaint was filed, so the Campbells suffered only minor economic injuries for the 18-month period in which State Farm refused to resolve the claim against them." *Id.* Moreover, the Court found that the punitive award could "not be justified on the grounds that State Farm was a recidivist" because the Campbells had "shown no conduct by State Farm similar to that which harmed them." *Id.* at 423-24. In assessing State Farm's reprehensibility, this Court had before it not only the parties' briefs, which discussed the reprehensibility guidepost and the conduct at issue at length, but also the opinions of the Utah Supreme Court and the Utah trial court, and a voluminous joint appendix ("JA") of the record in this case.

With regard to ratio, this Court made clear that while few punitive awards in a ratio of more than single digits to compensatory damages would pass constitutional muster, in many cases, "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.* at 425. The Court also stressed that emotional distress damages, such as those awarded to the Campbells, are likely to contain a punitive element and therefore support a smaller ratio. *Id.* at 426. Addressing the third guidepost, civil penalties authorized or imposed in comparable cases, this Court opined that the "most relevant civil sanction under Utah state law for the wrong done to the Campbells appears to be a $10,000 fine for an act of fraud." *Id.* at 428.

Pursuant to its application of the three *Gore* guideposts to this case, this Court concluded that, because the compensatory damages awarded to the Campbells were substantial and contained a punitive element, a punitive award in an amount "at or near the amount of compensatory damages" (*i.e.*, $1 million) likely would be the constitutionally permissible maximum. *Id.* at 429. Noting that the "proper calculation of punitive damages under the principles [the Court] ha[d] discussed should be resolved, in the first instance, by the Utah courts," this Court reversed the judgment and remanded the case "for proceedings not inconsistent with this opinion." *Id.*

The Proceedings Before the Utah Supreme Court on Remand. On remand, the parties briefed and argued before the Utah Supreme Court the meaning and scope of this Court's mandate and the proper calculation of punitive damages in light of this Court's decision. State Farm argued that, in accordance with this Court's opinion, the punitive award should be set in an amount at or near the compensatory damages of $1 million. *See, e.g.*, State Farm's Motion for Judgment Regarding Punitive Damages at 2-4; State Farm's Memorandum in Opposition to Plaintiffs/Appellees' Cross-Motion for Determination of Punitive Damages at 2, 26. Plaintiffs disagreed, urging that this Court's overall conclusion regarding the constitutionally appropriate amount of punitive damages in this case was "little more than the expression of a judicial hunch," "not having even the status of dictum" and "obviously . . . not binding" on the Utah Supreme Court. Memorandum of Plaintiffs/Appellees/Cross-Appellants in Opposition to State Farm's Motion for Judgment Regarding Punitive Damages at 2, 3.

In its opinion following remand, the Utah Supreme Court, apparently agreeing with plaintiffs, dismissed as a mere "prediction" this Court's determination that proper application of the *Gore* guideposts in this case "likely would justify a punitive damages award at or near the amount of compensatory damages," *i.e.*, $1 million. A.5. Instead, the Utah Supreme Court imposed a punitive damages award of $9,018,780.75, based on its reanalysis of the *Gore* guideposts in light of "Utah's values and traditions." A.7. In assessing State Farm's reprehensibility, the Utah Supreme Court classified the Campbells' emotional distress as "akin to physical assault" and characterized State Farm's conduct as showing "indifference or reckless disregard for the health and safety of the Campbells." A.10,12. Although acknowledging this Court's finding that State Farm was not a recidivist, the Utah Supreme Court opined that the "absence of prior bad acts does not mean that State Farm has forsworn the conduct that caused the Campbells' injury." A.13. The Utah Supreme Court also stressed State Farm's "protestations of blamelessness" and "obdurate insistence" in appealing this case, State Farm's purported "feelings of pride and victimization," and its "defiance" and lack of remorse. A.13; *see also* A.12 ("State Farm has not voiced so much as a whisper of apology

or remorse;" State Farm "refuses in its brief on appeal to concede any error or impropriety in the handling of the Campbell case").

In reanalyzing the ratio guidepost, the Utah Supreme Court asserted that it found "ample grounds" to justify a punitive damages award of $9 million, with a ratio of 9 to 1 to compensatory damages. A.13. The Utah Supreme Court rejected this Court's characterization of the compensatory emotional distress damages awarded in this case as containing a punitive element and thus warranting a lower ratio. The Utah Supreme Court concluded instead that the $1 million emotional distress damages in this case were purely compensatory and corresponded objectively to the actual "degree of emotional harm inflicted on the Campbells." A.15.

Finally, the Utah Supreme Court acknowledged that in this case the civil penalty for comparable conduct would be, as this Court stated, a $10,000 fine. A.17 & n.8. The Utah Supreme Court held, however, that the $9 million punitive award it imposed on State Farm did not "dwarf" the comparable $10,000 fine and thus was "in line" with this guidepost. A.17.

REASONS FOR GRANTING THE WRIT

The Utah Supreme Court's decision to award $9 million in punitive damages against State Farm contradicts this Court's opinion in this case and is inconsistent with the fundamental due process principles that limit punitive damages awards. The Utah Supreme Court characterized this Court's overall conclusion that application of the *Gore* guideposts in this case "likely would justify a punitive damages award at or near the amount of compensatory damages" as a mere "prediction." A.5. Thus, the Utah Supreme Court believed it could re-examine and reject numerous specific aspects of this Court's opinion, as incorrect and inapplicable in light of "Utah's values and traditions." A.7.

It is well settled that on remand for further proceedings from this Court, the lower court must proceed in accordance with this Court's mandate. *Briggs v. Pa. R.R. Co.*, 334 U.S. 304, 306 (1948). The lower court must implement both the letter and spirit of the mandate, and "cannot vary it, or examine it for any other purpose than execution; or give any other

or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded." *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895). Where, as in this case, this Court's mandate requires the lower court to proceed in a manner not inconsistent with the opinion of the this Court, the "effect is to 'make the opinion a part of the mandate.'" *Cooper Distrib. Co. v. Amana Refrigeration, Inc.*, 180 F.3d 542, 546 (3d Cir. 1999) (citation omitted).

This Court remanded this case for "proper calculation of punitive damages under the principles [the Court] ha[d] discussed." *Campbell*, 538 U.S. at 429. State Farm respectfully submits that this Court's remand for "proper calculation" of punitive damages was not an invitation to the Utah Supreme Court to impose a punitive damages award vastly in excess of what this Court reasoned would be the constitutionally permissible maximum. Rather, this Court's remand permitted the Utah Supreme Court to set an amount of punitive damages in light of and consistent with this Court's discussion. The Utah Supreme Court's new analysis of the application of the three *Gore* guideposts in this case, its repudiation of specific findings by this Court, and its resurrection of arguments and points rejected by this Court do not fall within the narrow zone of discretion granted to the Utah Supreme Court under this Court's opinion.

In its analysis, the Utah Supreme Court misapplied and distorted the three *Gore* guideposts. Its analysis of reprehensibility ignored or discounted the objective factors specifically identified by this Court as mitigating the reprehensibility of State Farm's conduct toward the Campbells. Contradicting this Court's specific findings that the harm to the Campbells "arose from a transaction in the economic realm, not from some physical assault or trauma" and that "there were no physical injuries" (538 U.S. at 426) the Utah Supreme Court reclassified the harm as "akin to physical assault." A.9,10. The Utah Supreme Court also discounted this Court's specific finding that State Farm was not a recidivist. Instead, the Utah Supreme Court invoked State Farm's purported failure to show remorse as a basis for speculating that "vigorous deterrence" (A.13) was needed – despite the plaintiffs' inability (expressly noted by this Court) to

point to any evidence that State Farm had engaged in any conduct in Utah similar to its conduct toward the Campbells. Moreover, the Utah Supreme Court's opinion makes clear that the purported lack of remorse it invokes to support its imposition of a $9 million punitive damages award is the lack of remorse supposedly evinced by State Farm during the litigation of this case and in its arguments on appeal. That purported lack of remorse (occurring more than a decade after the conduct toward the Campbells) was not part of and bore no similarity to the only conduct that this Court held would be relevant to punitive damages, namely, the alleged bad faith failure to settle the third-party claims against Mr. Campbell within policy limits. The Utah Supreme Court's punishment of State Farm's purported lack of remorse not only contravenes this Court's prohibition on the use of punitive damages to punish dissimilar conduct, but unconstitutionally burdens a defendant's right to defend itself in civil litigation.

The Utah Supreme Court also found that it was not bound by the ratio analysis that this Court specifically applied to the circumstances of this case. Thus, while this Court stated that a ratio of approximately 1 to 1 was appropriate on the facts of this case, the Utah Supreme Court found "ample" support for a ratio nine times greater, and found as well that the punitive element that this Court discerned in the emotional distress damages in this case did not in fact exist. The Utah Supreme Court did follow this Court's guidance in looking to a $10,000 civil fine as the touchstone for the civil penalties guidepost, but improperly concluded that this $10,000 civil penalty supported not a $1 million punitive award, but a $9 million award.

The Utah Supreme Court rationalized its divergence from this Court's opinion, particularly with respect to the reprehensibility guidepost, by invoking "Utah's values and traditions." A.7. No state's "values and traditions" override due process limitations on excessive and arbitrary punitive damages. The Utah Supreme Court's reliance on state "values and traditions" would improperly transform the federal constitutional due process standard for punitive damages into an uncertain analysis yielding different and unpredictable answers in every state, depriving defendants, particularly

non-resident businesses and corporations, of the constitutionally required notice that particular conduct is punishable and of the severity of the punishment that may be incurred. Permitting the grossly excessive punitive damages award now imposed by the Utah Supreme Court against State Farm to stand will turn back the clock on this Court's constitutional punitive damages jurisprudence and allow state courts to impose large and arbitrary punitive awards – in violation of due process constraints – whenever they invoke amorphous and ill-defined state "values and traditions."

For these reasons and those set forth below, this Court should grant State Farm's petition for a writ of certiorari. State Farm submits that, because the Utah Supreme Court's decision is palpably inconsistent with this Court's mandate and with fundamental constitutional principles, this Court should summarily reverse the Utah Supreme Court's decision pursuant to Supreme Court Rule 16 and instruct the Utah Supreme Court to enter a punitive damages award in an amount "at or near the amount of compensatory damages," *i.e.*, no more than $1 million. *See Campbell*, 538 U.S. at 429. In the alternative, this Court should permit full briefing and oral argument and afford plenary consideration to the important constitutional issues raised by the Utah Supreme Court's decision.

I. The Utah Supreme Court's Analysis of Reprehensibility Is Inconsistent with This Court's Opinion and Contrary to the Constitutional Principles Governing Punitive Damages

To justify imposition of a $9 million punitive award against State Farm, the Utah Supreme Court improperly rejected this Court's analysis of the reprehensibility guidepost as applied to the facts of this case. The Utah Supreme Court's distorted and erroneous analysis of reprehensibility contradicts this Court's express conclusions and findings and contravenes the broad standards enunciated by this Court in its constitutional punitive damages jurisprudence.

A. The Utah Supreme Court's Analysis Distorts and Misapplies the Five Reprehensibility Factors

This Court has identified five factors that courts must consider in determining the reprehensibility of a defendant's

conduct: "whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident." *Campbell*, 538 U.S. at 419 (citing *Gore*, 517 U.S. at 576-77).

In its decision on remand, the Utah Supreme Court rejected this Court's application of the five reprehensibility factors to the record in this case. In substituting its own analysis for that of this Court, the Utah Supreme Court misapplied and distorted each of the factors, producing a result that is directly contrary to this Court's opinion and dismantling the effectiveness of this Court's reprehensibility analysis as a rational, objective framework for evaluating the reprehensibility of a defendant's conduct.

1. Whether the harm was economic or physical

In its opinion in this case, this Court specifically found that "there were no physical injuries" and that the "harm arose from a transaction in the economic realm, not from some physical assault or trauma."[1] *Campbell*, 538 U.S. at 426. The Utah Supreme Court, although purporting to be "mindful" of these findings, reclassified the harm in this case as "akin to physical assault." A.9, 10. The Utah Supreme Court's recharacterization of the harm as akin to physical assault directly contradicts this Court's analysis and does not provide a permissible basis for the punitive damages award now imposed by the Utah Supreme Court.

The Utah Supreme Court's equation of State Farm's decision not to settle claims against its insured to "physical assault" would improperly allow a finding of extreme reprehensibility and hence high punitive damages in any case in which a breach of an insurance contract or failure to perform under an insurance contract causes emotional distress

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[1] In addition, as this Court observed, "State Farm paid the excess verdict before the complaint was filed, so the Campbells suffered only minor economic injuries for the 18-month period in which State Farm refused to resolve the claim against them." *Campbell*, 538 U.S. at 426.

damages. Such a result is contrary to this Court's opinion, which made clear that there was no physical assault or injury in this case and that emotional distress damages both generally *and in this case* contain a punitive element and thus support a lower ratio. *See* Point II *infra*.[2]

Moreover, the Utah Supreme Court's characterization of the Campbells' harm as "akin to physical assault" ignores the fact that, as the trial court found, the record was devoid of "objective evidence of emotional or mental distress."[3] JA 3364. To fill this evidentiary and analytic void, the Utah Supreme Court focused its lengthy analysis of whether the harm in this case was economic or physical on such matters as the purported statement by the lawyer retained by State Farm to represent Mr. Campbell that the Campbells should put a "for sale" sign on their house, the "unnecessar[y] subject[ion of] the Campbells to the risks and rigors of a trial," the failure to "voice[] so much as a whisper of apology or remorse," and so forth. A.11, 12. These matters are largely irrelevant to the classification of the Campbells' harm, and the Utah Supreme Court's discussion of them serves only to circumvent the purpose of this factor, which is to incorporate into the reprehensibility analysis the long-standing recognition that tortious conduct that results in physical injury is particularly blameworthy.[4] Neither the record nor this Court's opinion

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[2] To bolster its reprehensibility analysis, the Utah Supreme Court also noted that some insureds purchase insurance to provide peace of mind. A.10. Under this analysis, every wrongful denial of an insurance claim becomes "likely to cause injury more closely akin to physical assault or trauma than to mere economic loss." A.10-11. The purpose of the punitive damages analysis is not to contrive a one-size-fits-all justification of high punitive damages against insurance companies, but to weigh the facts of each case in a balanced and fair manner, as this Court did in its opinion in this case.

[3] As the trial court additionally noted, "[t]here was a relatively limited period of time in which the primary stressor, i.e., the threat of financial ruin, was a real threat to the Campbells." JA 3364.

[4] This Court's recognition of the heightened reprehensibility of tortious conduct involving physical injury or the threat of physical injury is based both on long-standing common law punitive damages principles and on analogous principles of criminal law. *See Gore*, 517 U.S. at 575-76 ("[W]e have said that 'nonviolent crimes are less serious than crimes

(continued...)

permitted the Utah Supreme Court to inflate its estimate of the reprehensibility of State Farm's conduct by classifying the Campbells' emotional distress in this case as "akin to physical assault."

2. Indifference or reckless disregard for the health and safety of others

The Utah Supreme Court's analysis of the second reprehensibility factor, whether State Farm showed "indifference or reckless disregard for the health and safety of others," is similarly skewed. The Utah Supreme Court, incorrectly, found that this factor was met because State Farm "evinc[ed] a reckless disregard for the Campbells' peace of mind." A.12. This factor, like the first factor, looks to *physical* injury or danger caused by a defendant's wrongful conduct as an indicator of heightened reprehensibility. *See, e.g., Bielicki v. Terminix Int'l Co.*, 225 F.3d 1159, 1165 (10th Cir. 2000) (applying *Gore* analysis; finding that indifference and reckless disregard for the health and safety of others was shown where the defendant's "atmosphere of condoning disregard of safety concerns resulted in permanent physical injuries to the plaintiffs"). An insurer's delay in paying an excess verdict is simply not the kind of conduct to which this factor applies.

3. Whether the target of the conduct had financial vulnerability

The Utah Supreme Court's reliance upon the third factor, whether the "target of the conduct had financial vulnerability," 538 U.S. at 419, is inconsistent with this Court's opinion and with the record in this case. Plaintiffs' arguments regarding the Campbells' purported vulnerability were fully briefed before this Court and urged by plaintiffs' counsel at oral argument. *See* Resp't Br. at 11-14; Pet'r Reply Br.

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[4](...continued)
marked by violence or the threat of violence'") (citing *Solem v. Helm*, 463 U.S. 277, 292-93 (1983), *Blanchard v. Morris*, 15 Ill. 35, 36 (1853) (upholding punitive damages for extortion accomplished through imprisoning and blindfolding victim and threatening to bleed him to death and hang him), and *Louisville & Nashville R.R. Co. v. Brown*, 106 S.W. 795, 799 (Ky. 1908) (reversing punitive damages award; stating: "We are not aware of any case in which the court has sustained a verdict as large as this one unless the [physical] injuries were permanent")).

at 6; *State Farm Mut. Auto. Ins. Co. v. Campbell*, Oral Argument Transcript, No. 01-1289, 2002 WL 31808900, at *28 (U.S. Dec. 11, 2002). This Court in its opinion did not address this factor in its application of the reprehensibility analysis to the facts of this case and hence implicitly rejected plaintiffs' arguments regarding the Campbells' purported vulnerability. *See Clemons v. Mississippi*, 494 U.S. 738, 747 n.3 (1990) (this Court "implicitly rejected" arguments "by refusing to address them").[5] The Utah Supreme Court's reliance on this ground for differing from this Court's assessment of reprehensibility is therefore impermissible.

In any case, the record does not support the Utah Supreme Court's portrayal of the Campbells as unsophisticated and vulnerable. Mr. Campbell had a B.A. in mathematics and an M.A. in meteorology from Utah State University. JA 747-48. He had taught high school and worked for 15 years for Boeing in engineering management. At the time of the accident he was working as an electrical contractor and was 63 years old. JA 747-48, 792-93. At the time of the accident, Mrs. Campbell was 51 years old and was working as a teller and in the bookkeeping department at Lewiston State Bank. R. 10312: 1-3; 25-26. Moreover, there was no testimony of any kind that the Campbells were *targeted* by State Farm. Although Ray Summers, the State Farm adjuster who handled the claims against Mr. Campbell testified as a plaintiffs' witness, he never in his testimony stated or suggested that the Campbells were "targeted" because they were financially vulnerable.

The Utah Supreme Court based its assumption that the Campbells' "vulnerability enabled, if not motivated," State Farm's conduct on the supposed "post-judgment advice given to the Campbells by State Farm's attorney that they put a 'for sale' sign on their house." A.12. Wendell Bennett, the lawyer retained by State Farm to defend Mr. Campbell, categori-

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[5] In addition, Justice Ginsburg's dissent discusses the Campbells' purported vulnerability, demonstrating beyond contradiction that these arguments were brought to the attention of and rejected by the Court. *See* 538 U.S. at 434 (Ginsburg, J., dissenting).

cally denied giving such advice to the Campbells.[6] In any event, Mr. Bennett's purported advice to the Campbells to put a "for sale" sign on their house has no logical or probative connection to the Utah Supreme Court's conclusion that State Farm was "enabled" or "motivated" by the Campbells' purported vulnerability. In addition, Mr. Bennett testified without contradiction that, after the verdict against Mr. Campbell, he suggested to the Campbells that they "go see another attorney" (JA 360), and, in fact, Mr. Campbell did consult with another attorney a day or two after the verdict. JA 749. Mr. Bennett's advice to consult another attorney is clearly inconsistent with the Utah Supreme Court's conclusion that State Farm (or Mr. Bennett) was motivated by the belief that Mr. Campbell would not "protect himself" from State Farm's "predations." A. 12. More importantly, the alleged advice to put a "for sale" sign on their house was before this Court, recited in this Court's opinion, and part of the basis for this Court's conclusion that State Farm's conduct "merit[ed] no praise." *Campbell*, 538 U.S. at 419. Consistent with this Court's opinion, that alleged advice cannot now serve as support for the proposition that State Farm's conduct was so extraordinarily reprehensible as to warrant a punitive damages award far in excess of that authorized by this Court.

4. Repeated actions or an isolated incident

This Court has stated that "repeated misconduct is more reprehensible than an individual instance of malfeasance" and that "evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law." *Gore*, 517 U.S. at 576-77; *see also Campbell*, 538 U.S. at 423. Conversely, in the absence of a "history of noncompliance," a court cannot justify a large puni-

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[6] Wendell Bennett, the lawyer for the Campbells, testified that he "absolutely didn't" tell the Campbells to put a for sale sign on the house. JA 359. He testified that after the original trial "[i]t was either Mr. or Mrs. Campbell said, 'Should we put a sign for sale on our property?' And I said no . . . . I said that I was going to file post trial motions, and if that failed, if I wasn't able to get the relief at that level, I planned to file an appeal to the Supreme Court." JA 360.

tive award on the ground that it was necessary to deterrence without considering whether a "less drastic" penalty would adequately protect the state's citizens. *Gore,* 517 U.S. at 584-85. Thus, the recidivism factor is directly related to the need for deterrence.

In this case, this Court found that State Farm was *not* a "recidivist" because the Campbells had "shown no conduct by State Farm similar to that which harmed them." *Campbell*, 538 U.S. at 423-24. In its reprehensibility analysis, the Utah Supreme Court conceded that it was "bound by [this] Court's finding that State Farm was not a recidivist." A.13. Nonetheless, the Utah Supreme Court entirely subverted that finding, theorizing that the "absence of prior bad acts does not mean that State Farm has forsworn the conduct that caused the Campbells' injury, and that the citizens of Utah therefore have no reason to deter State Farm's future conduct." A.13. The Utah Supreme Court's reliance on the purported need to deter State Farm, despite the "absence of a history of noncompliance," *Gore*, 517 U.S. at 584, is contrary to this Court's constitutional punitive damages jurisprudence and to this Court's opinion in this case.

The record in this case, moreover, showed not only an absence of similar prior bad acts, but also an absence of similar subsequent bad acts by State Farm in the decade and a half between the Campbells' automobile accident and the bad faith/punitive damages phase of the trial of the Campbells' claims against State Farm. The record established that between 1980 and 1994, State Farm handled more than 29,000 third-party bodily injury claims against its insureds in Utah. Of these more than 29,000 claims, Mr. Campbell's case was the *only* instance where a State Farm insured was exposed to the possibility of execution on an excess verdict after a refusal by State Farm to settle within policy limits.[7] *See* JA

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[7] The unrebutted testimony of State Farm's regional vice president Buck Moskalski established that in the five excess verdict cases in Utah since 1989, State Farm had determined it should bear the responsibility for its decision to proceed to trial rather than accept a settlement offer within policy limits. In those cases, State Farm either paid the excess verdicts in full or settled with the third-party claimants so that the insureds paid

(continued...)

287-97, 1851-53, 3005. Thus, this Court concluded in its opinion that "the adverse effect [of State Farm's handling of the claims against Mr. Campbell] on the State's general population was in fact minor." *Campbell*, 538 U.S. at 427.

In view of the record, the constitutional principles set forth in *Gore* and *Campbell*, and this Court's conclusion that State Farm was not a recidivist, the need for deterrence hypothesized by the Utah Supreme Court is wholly imaginary. The Utah Supreme Court's subjective and speculative impression that State Farm might not have "forsworn" the conduct alleged in this case – despite the uncontradicted, objective evidence to the contrary – is inconsistent with this Court's opinion and does not support the excessive punitive award imposed on remand by the Utah Supreme Court.

5. Whether the harm was the result of intentional trickery or malice

The Utah Supreme Court based its conclusion that the harm sustained by the Campbells was the result of trickery or malice upon the purported "false story" that State Farm manager Bob Noxon allegedly instructed State Farm claims handler Ray Summers to "manufacture," namely, that Todd Ospital "was speeding because he was on his way to see a pregnant girlfriend." A.14. This purported fact was before this Court when it made its reprehensibility analysis in this case. *See* Pet'r Br. at 5; Resp't Br. at 13; *Campbell*, 538 U.S. at 432 (Ginsburg, J., dissenting). Therefore, even assuming

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[7](...continued)
nothing. JA 1851-52. Mr. Moskalski also testified as to his decision made during the trial to formalize State Farm's policy of paying excess verdicts by sending letters to insureds prior to trial, promising to pay any compensatory damages that a jury might award in excess of policy limits. JA 1854, 1890. State Farm submitted examples of such "peace of mind" letters sent to Utah policyholders in accordance with Mr. Moskalski's decision, both in support of its motion for JNOV, new trial or remittitur before the trial court (which refused to accept the letters) and in support of its petition for rehearing to the Utah Supreme Court. *See* Pet'r Lodging ("L") 594-98; 599-607. State Farm's policy of sending such letters is also reflected in the Utah Supreme Court's opinion in *Green v. Louder*, 29 P.3d 638, 642, 648-49 (Utah 2001), in which the court specifically referenced such a letter provided by State Farm when it decided to litigate the third-party claims asserted against its insureds in that case.

the truth of this allegation and assuming that the Campbells' harm was somehow caused by the purported "manufacture" of this story,[8] that circumstance does not support the Utah Supreme Court's racheting up the punitive award from an amount "at or near the amount of compensatory damages" – as this Court concluded might be constitutionally justifiable – to an amount nine times in excess of that.

B. The Utah Supreme Court's Invocation of "Utah's Values and Traditions" and State Farm's Alleged Lack of Remorse Do Not Justify the Utah Supreme Court's Departure from This Court's Reprehensibility Analysis

In its zeal to punish State Farm severely, the Utah Supreme Court defied this Court's admonition that only a modest punishment was warranted. The Utah Supreme Court defended its departure from this Court's reasoned evaluation of the circumstances of this case by invoking "Utah's values and traditions." A.7. Utah values and traditions, in the context of the Utah Supreme Court's opinion, appear to consist primarily of vague notions of punishing pride, defiance and lack of remorse and contrition. *See, e.g.*, A.12, 13 (State Farm "has not voiced so much as a whisper of apology or remorse;" has not "forsworn the conduct that caused the Campbells' injury;" "we voiced our incredulity over State Farm's protestations of blamelessness;" State Farm refuses "to concede any error or impropriety;" "lack of remorse").

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[8] The allegation that Mr. Noxon "manufactured" the story of the pregnant girlfriend is not supported by the record. The only trial testimony regarding the pregnant girlfriend came from plaintiffs' expert Stephen Prater, who, based on his reading of a deposition of Ray Summers, claimed that "[t]here was no evidence of any pregnant girlfriend." JA 2171. By a February 27, 2004 order of the Utah Supreme Court, the record in this case has now been supplemented with the Summers' deposition relied upon by Prater. In that deposition, Summers testified that he heard either "from a roommate" of Mr. Ospital or "from the man who owned the car" driven by Mr. Ospital at the time of the accident that Mr. Ospital was on his way to Ogden because of a phone call from his girlfriend saying that she was pregnant. Deposition of Ray Summers, 10/16/1995, at 87-88. Moreover, the record establishes that the "story" that Mr. Ospital was speeding, although not later accepted by the jury, was supported by the testimony of the state trooper who responded to the accident and by the assessment of the accident made by Mr. Ospital's insurance company. L. 1047-50, L. 1051-52; JA 3326.

The Utah Supreme Court's imposition of $9 million in punitive damages for State Farm's purported failure to apologize and show remorse directly contravenes the controlling federal constitutional principles articulated by this Court in this case and in *Gore*. This Court's opinion in this case made clear that punitive damages must address "the conduct that harmed the plaintiff" and that dissimilar conduct may not be punished under the guise of evaluating reprehensibility. *Campbell,* 538 U.S. at 420-24. State Farm's purported failure to apologize and express remorse while defending itself against the Campbells' bad faith claims was not part of and is by no means similar to the alleged wrongdoing in this case – *i.e.*, the purported bad faith failure to settle the third-party claims against Mr. Campbell within policy limits. Consequently, the Utah Supreme Court's emphasis on lack of remorse is plainly improper under the reprehensibility guidepost as defined and analyzed in this Court's opinion.

The Utah Supreme Court's invocation of "Utah's values and traditions" does not justify its departure from the federal constitutional principles governing punitive damage awards. *See Campbell*, 538 U.S. at 427 ("While States enjoy considerable discretion in deducing when punitive damages are warranted, each award must comport with the principles set forth in *Gore*."). Indeed, the Utah Supreme Court's insistence on its own ad hoc evaluation of blameworthiness based upon Utah values and traditions is inconsistent with and undermines this Court's adoption in this case and in *Gore* of a five-factor analysis for reprehensibility. *See Campbell,* 538 U.S. at 419; *Gore,* 517 U.S. at 576-77. The five factors provide an objective, uniform framework, based upon traditional tort law principles, for evaluating reprehensibility. *See id.* The Utah Supreme Court's reliance on ill-defined, Utah-based notions of "reprehensibility" and the role of remorse and contrition in assessing punitive damages improperly transforms the federal constitutional due process standard for punitive damages into a subjective, arbitrary inquiry that may be answered differently in every state and in every court. Such a vague and variable standard would encourage unrea-

sonable and excessive awards.[9] It would deprive defendants, particularly non-resident defendants engaged in interstate commerce, of the constitutionally required notice of the severity of the punishment that their conduct might incur. *See Gore*, 517 U.S. at 574 ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice . . . of the severity of the penalty that a State may impose."). State Farm certainly did not have constitutionally adequate notice that Utah's "values and traditions" required State Farm to apologize or repent or else face a huge, multi-million dollar punitive award.

This is not to say that states may not make different judgments as to the seriousness of particular acts or conduct or that differing state standards have no place in the punitive damages analysis. Differing state standards are incorporated into the constitutional punitive damages analysis through substantive state tort law, whether statutory or decisional, through which the states may declare conduct tortious or unlawful, thus opening the way to a potential punitive damages award. *Campbell*, 538 U.S. at 422. Differing state standards are also incorporated into the constitutional punitive damages analysis through the comparable penalties guidepost, which looks to the relevant state's legislative judgments as to the seriousness of the conduct at issue. Consideration of legislatively set penalties in the punitive damages analysis ensures that a state's value determinations are reflected in a punitive award, provides some measure of impartiality, and helps ensure that defendants receive constitutionally adequate notice of the severity of the punishment that a particular jurisdiction may impose. *Cf. Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 301 (1989) (O'Connor, J., concurring in part and dissenting in part) (a comparable civil

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[9] The Utah Supreme Court itself acknowledged that "any determination of reprehensibility inevitably implicates moral judgments and is therefore susceptible to an arbitrary, inexplicable, and disproportionate outcome" and that the five factor analysis is intended to provide more objective "measuring tools." A.8. The Utah Supreme Court, however, applied the *Campbell* reprehensibility factors in an arbitrary and unsupportable way so as to reach a disproportionate outcome. *See* Point I.A. *supra*. That outcome cannot be justified through an invocation of Utah values and traditions.

penalty reflects "legislative judgments concerning appropriate sanctions for the conduct at issue").

In marked contrast to a legislative determination embodied in a statute, the Utah Supreme Court's invocation of state "values and traditions" in its assessment of reprehensibility produces an ad hoc, subjective inquiry that is untethered to any objective standard that would restrain punitive damages. If permitted to stand as precedent, the Utah Supreme Court's reliance on state "values and traditions" to trump the required constitutional analysis would result in a return to arbitrary and grossly excessive punitive awards unrestrained by definite and ascertainable standards. As such, it is contrary to the punitive damages jurisprudence of this Court. *See Campbell,* 538 U.S. at 416 ("The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor"). There is no place in our civil justice system for bypassing the due process protections in the United States Constitution to punish pride and a lack of remorse, which in any case do not constitute unlawful conduct.

Moreover, in punishing State Farm's perceived pride and lack of remorse the Utah Supreme Court is not punishing State Farm's conduct toward the Campbells, but is punishing State Farm for what it perceives as State Farm's general moral failings as well as for defending itself and appealing this case in court. *See* Point I.C *infra*. Such punishment is foreclosed by this Court's opinion in this case, which makes clear that "[a] defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." *Campbell,* 538 U.S. at 423.

In sum, the Utah Supreme Court's skewed analysis of the reprehensibility of State Farm's conduct toward the Campbells improperly placed that conduct at the far extreme of reprehensibility. Given the Utah Supreme Court's analysis, it is difficult to fathom where on the reprehensibility scale such matters as conduct aimed at intentionally causing severe physical injuries or conduct involving deliberate, repeated violations of a plaintiff's constitutional rights would find room. Clearly, the Utah Supreme Court has improperly inflated and overdrawn the reprehensibility of State Farm's conduct. The Utah Supreme Court's reprehensibility analysis

with its emphasis on remorse, pride and repentance cannot, as a matter of due process, support the imposition of a $9 million punitive award.

C. The $9 Million Punitive Award Improperly and Unconstitutionally Punishes State Farm for Its Litigation Conduct and Arguments in Defending the Bad Faith and Punitive Damages Case

In its analysis of reprehensibility and of State Farm's purported lack of remorse, the Utah Supreme Court relied heavily upon State Farm's efforts in defending itself at the bad faith/punitive damages trial and in pursuing its appeal. Indeed, the Utah Supreme Court is emphatic in directing its opprobrium to arguments made by State Farm's attorneys, as well as to testimony by State Farm employees, who said that they were proud of State Farm. Reiterating its earlier opinion in this case, the Utah Supreme Court stated:

> State Farm's obdurate insistence that its treatment of the Campbells was proper clearly calls out for vigorous deterrence.
>
> In *Campbell I*, we voiced our incredulity over State Farm's protestations of blamelessness. We noted: "State Farm refuses in its brief on appeal to concede any error or impropriety in the handling of the Campbell case. Rather, testimony at trial indicated that State Farm was 'proud' of the way it treated the Campbells. Further, State Farm asserts [in its appellate brief] that it is in fact a 'victim' in this case because it is the target of the secret 'conspiracy' perpetrated by the Campbells, Ospital, Slusher, and their attorneys to bring this bad faith lawsuit and to share any recovery received." . . . The Supreme Court did not take issue with this observation. Since *Campbell I*, State Farm has directed us to no evidence suggesting that it has gained insight into the wrongfulness of its behavior or has reconsidered its feelings of

pride and victimization. A.13.[10]

Surely, this Court's opinion in this case cannot be read to endorse imposition of punitive damages on the basis of a litigant's exercise of its constitutionally protected right to defend itself. But that is precisely what the Utah Supreme Court has done by using State Farm's litigation decisions, testimony, and legal arguments in defending against the Campbells' bad faith claims and appealing the judgment against it as a predicate for a determination of extreme blameworthiness meriting severe punishment.[11] The Utah Supreme Court's decision impermissibly threatens increased punitive damages whenever a defendant chooses to contest tort liability, unconstitutionally burdening the due process rights of defendants in civil litigation. *See Nelson v. Adams USA, Inc.*, 529 U.S. 460, 466 (2000) (due process requires that defendants in civil litigation have an adequate opportunity to defend against the imposition of liability) (citing *American Sur. Co. v. Baldwin*, 287 U.S. 156 (1932)).

The Utah Supreme Court's punitive condemnation of a

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[10] The Utah Supreme Court's criticism of State Farm's feelings of "victimization" is directed at arguments made by State Farm on appeal concerning the exclusion of evidence of the secret agreement, entered into by Slusher and the Ospitals, the third-party claimants in the underlying accident case, to pursue a bad faith claim against State Farm should the underlying trial result in an excess verdict. That secret agreement provided that the Ospitals and their attorneys would aid Slusher first in the trial of Slusher's claims against Campbell and later in litigation to be brought against State Farm for bad faith. *See* L.1647. The Ospitals' attorney explained to Slusher's attorney that "[b]efore this [bad faith] action can be filed, we would have to obtain a Judgment against . . . Campbell[] which . . . would exceed his policy limits. We then obtain an assignment of all claims from Mr. Campbell, in turn for an agreement not to execute against him personally, and we then bring a bad faith action against State Farm." R. 5897. On appeal before the Utah Supreme Court, State Farm argued that it should have been allowed to present evidence of this agreement in the bad faith trial, as the agreement (which was unknown to State Farm at the time of the original trial) was relevant to the jury's assessment of the reasonableness of State Farm's decision not to settle and helped explain why that trial resulted in so poor an outcome for Mr. Campbell. *See* Brief of Appellant, 6/7/1999, at 46-52.

[11] Of course, under Fed. R. Civ. P. 11 and Fed. R. App. P. 38 and their state analogs as well as under their inherent power, courts are authorized to sanction frivolous or improper briefs and improper courtroom conduct.

defendant's efforts in litigation is not without parallel. Other courts, in decisions post-dating this Court's opinion in this case, also have improperly relied upon a defendant's litigation strategy as justifying a higher punitive damages award. *See, e.g., Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 677 (7th Cir. 2003) (citing defendant's "aggressive defense" and "host of frivolous evidentiary arguments" in upholding punitive damage award); *Hollock v. Erie Ins. Exch.*, 842 A.2d 409, 419-22 (Pa. Super. Ct. 2004) (affirming $2.8 million punitive award, with a 10:1 ratio, largely on the basis of the defendant insurer's conduct during trial of bad faith claim against it rather than the underlying conduct giving rise to the bad faith claim).

In contrast to these decisions and the decision of the Utah Supreme Court, California courts have consistently held that, as a matter of law, a "defendant's trial tactics and litigation conduct may not be used to impose punitive damages in a tort action." *De Anza Santa Cruz Mobile Estates Homeowners Ass'n v. De Anza Santa Cruz Mobile Estates*, 94 Cal. App. 4th 890, 918 (Ct. App. 2001); *accord, e.g., Palmer v. Ted Stevens Honda,* 193 Cal. App.3d 530, 537-40 (Ct. App. 1987). In so ruling, California courts have looked to the constitutional and tort law principles that mandate that there can be "no tort of 'malicious defense' arising from a defendant's conduct in defending a lawsuit, or 'malicious filing of an appeal' for filing an appeal in bad faith." *De Anza,* 94 Cal. App. 4th at 918 (citations omitted). As one California court explained, "due process considerations are implicated to the extent that tort damages are based on evidence that a defendant filed motions, appeals and other legal proceedings during the course of litigation or opposed motions filed by the other party." *Id.* "Pursuing authorized forms of relief before courts or other governmental tribunals is a protected right and cannot be the basis for tort liability" except in the narrow circumstances where a properly pleaded action for malicious prosecution may be brought. *Id.* Likewise, a defendant's conduct of its defense or its briefs on appeal do not form a constitutional basis for imposing punitive damages. *Id.* at 918-19.

The Utah Supreme Court's imposition of punitive damages for State Farm's failure to concede liability at trial, for

testimony by its employees that they were proud of State Farm, and for arguments made by State Farm's counsel during the trial and on appeal, punishes conduct that is dissimilar and unrelated to State Farm's conduct toward the Campbells – *i.e.*, the alleged bad faith failure to settle the third-party claims against Mr. Campbell within policy limits. That punishment is contrary to the constitutional principle enunciated by this Court that punitive damages must be based upon the defendant's conduct toward the plaintiffs upon which the plaintiffs' claims are based and that a defendant's dissimilar conduct does not furnish a permissible basis for punitive damages. *See Campbell*, 538 U.S. at 422-23, 427. As Judge Klein reasoned in his dissent in *Hollock*, punitive damages in a bad faith case should be directed toward punishing "only conduct that relates to the bad faith harm." 842 A.2d at 423 (Klein J., dissenting). Basing punitive damages on a defendant's actions during the bad faith trial itself contravenes this Court's holding that "'[a] defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages.'" *Id.* at 423 (Klein, J., dissenting) (quoting *Campbell*, 538 U.S. at 422). As Judge Klein pointed out, defense strategy and actions during a bad faith trial are not part of the original conduct:

> [B]ecause the duty of good faith and fair dealing is extinguished once a settlement has been reached or a judgment entered, the insurer's fiduciary duty does not extend past that point. Thus, no bad faith can be imputed to the insurer for actions taken post-judgment or post-settlement . . . . No action taken by [defendant] in defense of the bad faith claim can be considered in determining whether [defendant] committed bad faith in the investigation and handling of the underlying UIM claim. *Id.* at 423.

The Utah Supreme Court's continued reliance on State Farm's appellate briefing as a basis for punitive damages is particularly egregious, given that State Farm has been shown to have been right in its objections to the Utah trial procedures that unconstitutionally allowed this case to be "used as a platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country," *Camp-*

bell, 538 U.S. at 420, and that the $145 punitive damages award reinstated by the Utah Supreme Court was unconstitutional and in violation of State Farm's due process rights. *Id.* at 429. Nevertheless, the Utah Supreme Court in its new opinion reiterates its earlier criticism of State Farm's appellate briefing as showing "defiance" and feelings of "victimization." A.13. Likewise, the Utah Supreme Court also repeats its criticism of State Farm's feeling of "pride," based on the individual testimony of certain State Farm employees who (when asked by plaintiffs' counsel) stated that they were proud of State Farm and of being State Farm employees.[12]

It is evident that meting out punitive damages in the millions of dollars based upon a defendant's arguments on appeal or upon its attempts to defend against liability and/or the imposition of punitive damages at trial will, if permitted to continue, have a chilling effect on the defendant's lawful exercise of its due process rights to defend itself. This Court in its opinion in this case held that "[a] State cannot punish a defendant for conduct that may have been lawful where it occurred." *Campbell*, 538 U.S. at 421; *see also Gore*, 517 U.S. at 572-73 & n.19 ("Alabama does not have the power . . . to punish BMW for conduct that was lawful where it occurred") (citing *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the

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[12] The preposterousness of the Utah Supreme Court's citing that testimony as supporting the $9 million punitive damages award it has now imposed is shown by the testimony itself. Paul Short, a State Farm claims adjuster who was not involved in handling the claims against the Campbells, testified as follows:

> Q [Plaintiffs' attorney] You would be proud to have State Farm treat any insured the way they've treated the Campbells.
>
> A I'm proud of the way State Farm treats everybody. State Farm believed in Mr. Campbell, when the underlying case was tried –
>
> MR. CHRISTENSEN: That's all right, you've answered my question. Thank you.

JA 2712. Mr. Short's innocuous testimony, according to plaintiffs' expert Stephen Prater, "suggests that they're proud and they've done nothing wrong in this case, which I think is outrageous." JA 2453. State Farm adjuster Jerry Stevenson, who worked on the Campbell file, also testified that he was "proud" of State Farm although "sorry" for any policyholder's trauma, worry or sleepless nights. *See* JA 2831-2833.

most basic sort")). The Utah Supreme Court, in punishing State Farm for vigorously defending itself at trial and on appeal, is punishing conduct that is lawful in Utah and everywhere else in this country. No legitimate state purpose is served by penalizing such lawful conduct, and a punitive damages award based upon such lawful conduct is arbitrary and violates due process. *See Campbell*, 538 U.S. at 416-17, 421. The multiple and serious due process considerations raised by the Utah Supreme Court's assessment of punishment based on a defendant's efforts to defend itself at trial and on appeal warrant resolution by this Court.

II. The Utah Supreme Court's Application of the Ratio Guidepost Is Erroneous and Inconsistent with This Court's Opinion

In determining that a 9 to 1 ratio comported with constitutional limits in this case, the Utah Supreme Court flatly refused to honor the spirit and letter of this Court's opinion. In its opinion, this Court set forth a basic principle limiting the ratio of punitive damages to compensatory damages in cases where compensatory damages are substantial. This Court opined: "When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Campbell*, 538 U.S. at 425. The Court then specifically determined that this principle governed the punitive damages award *in this case*. In reaching that conclusion, the Court stressed that the substantial emotional distress damages of $1 million awarded to the Campbells already contained a punitive element. *Id.* at 426, 429. The Court explained that

> [t]he compensatory damages for the injury suffered here . . . likely were based on a component which was duplicated in the punitive award. Much of the distress was caused by the outrage and humiliation the Campbells suffered at the actions of their insurer; and it is a major role of punitive damages to condemn such conduct. Compensatory damages, however, already contain this punitive element.

Id. at 426 (citing Restatement (Second) of Torts § 908, cmt. c, p. 466 (1977)). Accordingly, this Court concluded that

"[a]n application of the *Gore* guideposts to the facts of this case, especially in light of the substantial compensatory damages awarded (a portion of which contained a punitive element), likely would justify a punitive damages award at or near the amount of compensatory damages." *Id.* at 429.

The Utah Supreme Court turned this Court's ratio analysis on its head. The Utah Supreme Court began its analysis by inaccurately restating and limiting this Court's rule on punitive damages in cases where substantial compensatory damages have been awarded as "applicable where a sizeable compensatory damages award for *economic* injury is coupled with conduct of *unremarkable reprehensibility*." A.15-16 (emphasis added). The Utah Supreme Court also concluded that, contrary to this Court's opinion, the emotional distress damages in this case contained no punitive component because the trial court had remitted such damages from $2.6 million to $1 million so as to reflect the purported actual worth of the Campbells' distress. A.15.[13] The Utah Supreme Court then proceeded to the conclusion that conduct which "causes $1 million of emotional distress and humiliation is markedly more egregious than conduct which results in $1 million of economic harm" and that "such conduct is a candidate for the imposition of punitive damages in excess of a 1-to-1 ratio to compensatory damages." A.16. Thus, according to the Utah Supreme Court, "[s]imply put, the trial court's determination that State Farm caused the Campbells $1 million of emotional distress warrants condemnation in the up-

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[13] With regard to the Utah Supreme Court's reliance on the "efforts of the jury" "ensur[ing] that the compensatory damages award was . . . based on considered evaluation of the degree of emotional harm inflicted on the Campbells by State Farm" (A.15), it is worth noting that plaintiffs' counsel in his closing statement stressed to the jury that if they awarded an insufficient amount of compensatory damages, any punitive damages award they made would be "subject to attack in motions hereafter or on appeal." JA 3243 ("Anything less [than $1.5 million] in compensatory damages will then call into question whether or not the punitive damages may be awarded, because again I emphasize the compensatory damages are needed to sustain a large punitive damage award. Without it, it is subject to attack in motions hereafter or on appeal."). Moreover, in its oral ruling, the trial court expressly included the "outrageousness of State Farm's overall plan" among the factors "justifying the amount of [emotional distress] damages that the Court has awarded." R.10292:115.

per single-digit ratio range rather than the 1-to-1 ratio urged by State Farm." A.16. The Utah Supreme Court's logic is directly contrary to this Court's opinion and improperly relies upon the $1 million dollar emotional distress damages to jack up the punitive award, rather than to mitigate it in accordance with this Court's opinion.

The Utah Supreme Court was not free to reject this Court's determination that the emotional distress damages in this case contained a punitive element as an "abstract proposition" that failed to take into account that the trial court had purportedly "purged" the emotional distress damages of any punitive element when it remitted them to $1 million. A.15. Contrary to the Utah Supreme Court's contention, this Court's determination that emotional distress damages contain a built-in punitive component was not merely "an abstract proposition." Rather, as discussed above, this Court expressly applied that proposition to the emotional distress damages *in this case*. *See Campbell*, 538 U.S. at 426, 429. Moreover, the evidence regarding the degree of the Campbells' emotional distress was discussed by the parties in their briefing before this Court, and the trial court's decision regarding remittitur was reproduced in the parties' joint appendix and was cited to this Court in the parties' briefing. JA 3322, 3359-69; Pet'r Br. at 5; Resp't Br. at 3. Consequently, the Utah Supreme Court's claim that the trial court's reduction of the emotional distress damages had "purged" those damages of any punitive component is contrary to this Court's opinion and impermissible under the Court's mandate. Moreover, even a cursory reading of the trial court's opinion reveals that in setting the Campbells' emotional distress damages at $1 million, the trial court relied as much on evidence of what it perceived to be the outrageous nature of State Farm's conduct as upon evidence of the emotional distress actually suffered by the Campbells. JA 3367; *see also* p. 26 n.13 *supra*. Indeed, the trial court acknowledged that "[t]here was a relatively limited period of time in which the primary stressor, i.e., the threat of financial ruin, was a real threat to the Campbells" and that "[t]here was a lack of objective evidence of emotional or mental distress." JA 3364. Thus, the trial court's opinion in fact confirms the correctness of this Court's conclusion that the emotional distress damages in the case contained a punitive element.

In any case, the principle enunciated by this Court – that, in cases where substantial compensatory damages have been awarded, a 1 to 1 ratio may represent the outermost limit of due process – was reinforced by, but not dependent upon, this Court's conclusion that the emotional distress damages *in this case* contained a punitive element. In its opinion, this Court acknowledged that any substantial compensatory award may have a punitive and deterrent effect. *See Campbell*, 538 U.S. at 419 (stating that "[i]t should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of *further* sanctions to achieve punishment or deterrence") (emphasis added). Indeed, an award of emotional distress damages, whether or not it reflects a deterrent or punitive intent upon the part of the judge or jury, normally has a considerable deterrent and punitive effect. As State Farm argued before this Court, "the $1 million compensatory award has a substantial deterrent effect in itself, because it is far in excess of the amount (the $50,000 policy limit minus the cost of litigation) that State Farm could have hoped to save by litigating rather than settling the third-party claims against Mr. Campbell." Pet'r Br. at 32 n.30.

In sum, the Utah Supreme Court's disregard of the 1 to 1 ratio approved by this Court was constitutionally erroneous as well as inconsistent with the mandate of this Court. This Court should grant State Farm's petition to correct the Utah Supreme Court's refusal to follow the mandate of this Court.

III. The Utah Supreme Court's Analysis of the Comparable Penalties Guidepost Is Inconsistent with This Court's Opinion and Does Not Support the $9 Million Punitive Damages Award

Under the Utah Supreme Court's opinion on remand, the comparable penalties guidepost is stripped of its function of imposing reasonable limits on punitive damages. Although the Utah Supreme Court acknowledged that the relevant civil penalty under Utah law was a $10,000 fine, the Court found that its $9 million award did not "dwarf" that fine and therefore "h[e]ld fast to [its] conviction that a punitive damages award of $9,018,780.75 is in line with the third *Gore* guide-

post." A.17. The Court reasoned that because this Court had "endorsed" a $1 million punitive damages award, "which is one hundred times greater than the $10,000 fine," then, presumably, a $9 million award, 900 times greater than the relevant civil penalty, must also pass constitutional muster. A.17. State Farm respectfully submits that the comparable $10,000 civil penalty in no way supports a $9 million punitive award in this case, but rather requires a substantial lowering of that award.

The Utah Supreme Court's opinion improperly discounted the importance of the comparable penalties, terming the "quest" to apply this guidepost "quixotic." A.17. The Court attempted to justify its disregard of the legislative judgment reflected in the $10,000 penalty provided by Utah law for fraudulent acts by insurers by noting that "while a $10,000 fine for fraud may appear modest in relationship to a multi-million dollar punitive damages award, it is identical to the maximum fine which may be imposed on a person in Utah for the commission of a first degree felony, the classification assigned our most serious crimes." A.17. Whether the Court meant that the Utah legislature is somehow equating an act of insurer misconduct with the most serious felonies or whether it simply meant that the Utah legislature is somehow irrational in the penalties it sets and that its judgments may therefore be accorded less weight, the Court's disparagement of the comparable penalties guidepost is illogical and erroneous. The fact that the criminal penalties provided by Utah law for serious felonies committed by *persons*[14] include a $10,000 fine in addition to lengthy prison sentences has little or no relevance to the fact that the Utah legislature has seen fit to impose a modest $10,000 fine for a single act of fraud by insurance companies and certainly does not authorize the Utah Supreme Court to disregard the comparable penalties guidepost.[15]

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[14] Utah Code Ann. § 76-3-301 (2003), cited by the Utah Supreme Court, expressly states that it does not apply to corporations, but only to natural persons.

[15] Despite this Court's rejection of the Utah Supreme Court's "speculat[ion] [in its previous opinion] about the loss of State Farm's (continued...)

The Utah Supreme Court's reluctance to give meaning and force to the comparable penalties guidepost belies the Court's asserted allegiance to Utah values, which are embodied in the "legislative judgments concerning appropriate sanctions for the conduct at issue," *Browning-Ferris*, 492 U.S. at 301 (O'Connor, J. concurring in part and dissenting in part), and not in the subjective and personal views of judges. The comparable penalties guidepost in this case, if the Utah Supreme Court had been willing to heed it, clearly points to the excessiveness of the $9 million punitive damages award.

CONCLUSION

This Court should grant State Farm's petition for a writ of certiorari. Because the Utah Supreme Court's decision is plainly inconsistent with this Court's mandate in its opinion in this case, this Court should summarily reverse the Utah Supreme Court's decision pursuant to Supreme Court Rule 16 and instruct the Utah Supreme Court to enter a punitive damages award in an amount "at or near" the amount of compensatory damages, *i.e.*, no more than $1 million. *See Campbell*, 538 U.S. at 429. In the alternative, this Court should afford plenary review, with briefing and oral argument by the parties, of the important constitutional issues raised by the Utah Supreme Court's decision.

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[15](...continued)
business license," *Campbell*, 538 U.S. at 428, the Utah Supreme Court repeated in its new opinion its unsupported surmise that "State Farm's behavior, particularly if it were to become a pattern in Utah, may indeed be justification for termination of its license . . . ." A.17 n.8. The Court cites no Utah statute or regulation that would subject an insurance company to termination of its license for a single act of the kind at issue in this case. Nor can the Court's insistence on imagining that this excess verdict case could "become a pattern in Utah" justify using the loss of license as a comparable penalty in this case.

Respectfully Submitted,

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